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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 227.

FRANCISCO BALLESTER-HUECAL, *Petitioner*,

v.

COURT OF TAX APPEALS OF PUERTO RICO, ET AL., *Respondents*.

REPLY BRIEF FOR PETITIONER, IN REPLY TO THE "BRIEF FOR THE RESPONDENTS IN OPPOSITION."

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SUBJECT INDEX.

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REPLY BRIEF FOR PETITIONER, IN REPLY TO THE "BRIEF FOR THE RESPONDENT IN OPPOSITION."

The "Brief for the Respondent in Opposition" makes no direct answer to our Petition for Certiorari and Supporting Brief, but is an ably drawn camouflage of the weakness of Respondents' position, belittling and in some cases baldly contradicting our statements and arguments, but without real endeavor to analyze or directly to answer them.

It makes no attempt directly to answer or to discuss our analysis of this Court's decision in *Knowlton* v. *Moore;* nor those portions of our Petition and Supporting Brief indicating that the community property law question here involved is not purely a question of local Puerto Rican law but is one of federal law, turning upon the insular Su-

preme Court's misunderstanding and misapplication of decisions of this Court; nor that the question of "confiscation" here presented is not merely a question of the amount of the tax but relates to the limitations imposed by the Congress upon the local taxing powers delegated to the insular legislature by Section 3 of the Organic Act; nor the other major propositions stated in the "Questions Presented" in our Petition (pp. 23-31) and the "Argument" (pp. 36-81) in our Supporting Brief.

Points I and II.

With regard to these two Points of our Supporting Brief (pp. 36-57) and the corresponding first two "Questions Presented" of our Petition (pp. 23-24), Respondents' Brief in Opposition simply ignores the essential central theme of our arguments and discussion. It attempts no direct reply to it whatever.

In those two Points we show that the word "*uniform*", *when used without any qualification or limitation whatever*, as it is in the 22nd paragraph of Section 2 of the Organic Act of Congress for Puerto Rico requiring

> "That the rule of taxation in Puerto Rico shall be uniform",

necessarily requires "intrinsic" or "inherent" uniformity; and not merely "geographic uniformity" as was erroneously held by the insular Supreme Court of Puerto Rico affirmed by the Circuit Court of Appeals in this case; and that, therefore, it necessarily follows that the insular Legislature is without power to levy so-called "progressive" income taxes levying progressively higher rates upon higher incomes.

In support of those propositions we cite decisions of the Supreme Courts of five States, holding their respective Legislatures without power to levy progressive taxes under State constitutions containing requirements that taxation

shall be "uniform" or "equal and uniform";[1] and we quote the careful opinion of this Court in *Knowlton* v. *Moore*, 178 U. S. 41, 83 *et seq.*, in which this court, speaking by Mr. Justice White, specifically recognized the correctness of that rule, and that the word "uniform", when used without qualification in a requirement of uniformity in taxation,[2] forbids progressive taxation; and in which this Court sustained the progressive tax features of the federal inheritance tax law of Congress, *only because of the presence of the qualifying words "throughout the United States"*[3] in the provision concerning "Duties, Imposts and Excises" in the first Clause of Section 8 of Article I of the Constitution.

And we point out further that that leading decision of this Court was handed down on May 14, 1900, and has stood unchallenged ever since; and that nearly seventeen years later the Congress enacted the Organic Act for Puerto

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[1] Alabama; Illinois; Pennsylvania; Tennessee; and Washington. (Our Supporting Brief p. 50.) No contrary decisions have been found; and none are cited by Respondent.

[2] As it is used in this Section 2 of the Organic Act for Puerto Rico.

[3] "The argument to the contrary, *whilst conceding that the tax devised by the statute does not fulfill the requirement of equality and uniformity, as those words are construed when found in State constitutions*, * * *."

"* * * It is apparent that the controversy cannot be disposed of by mere reference to prior adjudications, * * *. But to determine which view of the cited authorities is the correct one, it will become necessary * * * to elucidate the language of the opinions * * *. We are, moreover, impelled to this course from the fact that *as the word 'uniform', or the words 'equal and uniform', are now generally found in State constitutions, and as there contained have been with practical unanimity interpreted by State courts as applying to the intrinsic nature of the tax and its operation upon individuals*, if it be that the words 'uniform throughout the United States,' as contained in the Constitution of the United States, have a different significance, the reason for such conclusion should be carefully and accurately stated." (*Knowlton* v. *Moore*, *supra*, 178 U. S. 41, 84, 87-99; quoted in our Supporting Brief, pp. 38, 39, 42, 45; *Italics supplied.*)

Rico of March 2, 1917, containing in its Section 2 this absolute requirement, without any qualification whatsoever, that the rule of taxation in Puerto Rico shall be "uniform"; and that, in accordance with the established rule, it must be presumed that, in so using that absolute unqualified word "uniform", the Congress intended to use it with the same meaning that had thus been recognized for it by this Court in its decision seventeen years earlier in *Knowlton* v. *Moore*, as being that which, "with practical unanimity" had been given to it by State courts wherever used in State constitutions, "as applying to the intrinsic nature of the tax and its operation upon individuals."

Further, we point out (Petition, Point I-F, pp. 43-44, and Point II, pp. 54-57), that this is the construction heretofore always given to this provision of the Organic Act, alike by the insular Courts and by the Circuit Court of Appeals of the United States for the First Circuit,—to which Puerto Rican appeals directly go,—apparently without any question whatever until the decision of the insular Supreme Court in the present case; and we there cite the cases upon which we rely for that proposition.

Respondent's answer as to these two Points. Respondent makes no attempt whatever to analyze or directly to answer our arguments on either of these two first Points. With regard to them, it says only [*Brief in Opposition*, pp. 5-6]:

> "It is well settled that the analogous provisions of Article I, Section 8, of the Federal Constitution that 'all Duties, Imposts, and Excises shall be uniform throughout the United States,' requires only geographical uniformity. *Knowlton* v. *Moore*, 178 U. S. 41, 92; *Brushaber* v. *Union Pac. R.R.*, 240 U. S. 1, 24. It is equally clear that when Congress incorporated the requirement of uniformity in the Organic Act, it intended the same meaning that had always been attributed to it in the Constitution".

And then they cite in support of that last proposition of theirs (*their second sentence, above*), the very same cases

[*Kepner* v. *United States*, 195 U. S. 100, 124, and *Serra* v. *Mortiga*, 204 U. S. 470, 474], which we cite in our Supporting Brief (p. 42), and upon which we rely in support of our proposition that when the Congress, on March 2, 1917, in enacting the Organic Act for Puerto Rico, put into it, in the 22nd paragraph of its Section 2, this unqualified requirement that the rule of taxation in the Island shall be "uniform",—without any limiting qualification at all,—it must necessarily be presumed to have intended to use that unqualified word "uniform" in the same sense in which this Court had said, seventeen years earlier, in *Knowlton* v. *Moore, supra*, that it was "with practical unanimity" interpreted when so used in State constitutions; and that, in view of that clear cut decision of this Court, the Congress when, seventeen years later, it was enacting the Organic Act for the Island, would most surely and certainly,—if it had really intended that the restriction which it was thus imposing concerning the rule of taxation in the Island was to be understood as requiring only "geographical uniformity" throughout the Island,—have clearly expressed such a purpose, by appending to the word "uniform" the phrase "throughout the Island", or some other similar modifying or qualifying phrase substantially modeled upon the phrase, "throughout the United States" used in Clause 1 of Section 8 of Article I of the Constitution, which this Court had so carefully considered and expounded in its opinion in *Knowlton* v. *Moore*.

Respondent's above quoted statement is really no answer at all; either to our "Point I", or to our "Point II".

In the first place its first sentence wholly misses, or ignores, the entire point of our argument here. It says simply that it is well settled that the "*analogous*" provision of Section 8 of Article I of the Constitution that all duties imposts and excises shall be "*uniform throughout the United States*", requires "only geographical uniformity". Nobody questions that, since *Knowlton* v. *Moore*. But that is no answer to our argument. The provisions of that Sec-

tion of the Constitution, and of the 22nd paragraph of Section 2 of the Organic Act of Puerto Rico, may be "analogous"; but they are not identical.

That there is all the difference in the world between "uniform" (*unqualified*) on the one hand, and "uniform *throughout the United States*" [or "uniform throughout the Island of Puerto Rico"; or "throughout the Island", or "throughout Puerto Rico"] on the other hand, is the very point of our argument; and is also the very core of MR. JUSTICE WHITE's opinion and of this Court's decision in *Knowlton* v. *Moore*. That, on the one hand, the single word "uniform", unqualified, imports absolute or "intrinsic" or "inherent" uniformity, commanding that taxes laid under that rule shall, as MR. JUSTICE WHITE phrased it in *Knowlton* v. *Moore* (178 U. S. *supra*, at p. 84; quoted in our Supporting Brief, pp. 38-39),

> "be equal and uniform in their operation upon persons and property in the sense of the meaning of the words equal and uniform as now found in the constitutions of most of the States of the Union";

whereas, on the other hand, the phrase "*uniform throughout the United States*" is satisfied,—[and the correlative phrase "*uniform throughout the Island of Puerto Rico*" would have been satisfied, if the Congress had seen fit to use it in this Section 2 of the Organic Act],[4]—with merely "geographical uniformity".

As above stated, Respondent's brief attempts no answer to our argument here; does not question the correctness of our analysis of this Court's opinion in *Knowlton* v. *Moore*; does not deny that this is the essential core of that opinion; does not question the accuracy of our citations of decisions of State courts cited on page 50 of our Supporting Brief; and does not cite any contrary decisions.

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[4] Instead of using the unqualified word "uniform", as the Congress actually did.

And in the second place, the *second sentence* of Respondent's statement above quoted [*ante*, p. 4; top of p. 6 of Respondent's brief], that:

> "It is equally clear that when Congress incorporated the requirement of uniformity in the Organic Act, it intended the same meaning that had always been attributed to it in the Constitution,"

embodies substantially the same fallacy.

The Congress, in enacting the Organic Act of 1917, *chose not to use the same phrase* "uniform *throughout the United States*" employed by the Founding Fathers in the "analogous"[5] provision in Section 8 of Article I of the Constitution; *but chose instead to use* the *unqualified* single word "uniform", with regard to which this Court, seventeen years before, in its opinion in *Knowlton* v. *Moore*, had so clearly pointed out that it bore the very different connotation of an absolute requirement of "inherent" or "intrinsic" uniformity.

Under those circumstances, the same established rule of statutory construction here invoked by the Respondents operates directly against them, and in our favor; and requires, as is pointed out in our Supporting Brief [Point I-D, p. 42], that, as we there said:

> "Plainly, the Congress must be presumed, in using that phraseology, to have done so in view of the decision of the United States Supreme Court in *Knowlton* v. *Moore;* and with Mr. Justice White's language in that opinion in mind;"

that is to say, with the intent that this unqualified word, "uniform", shall mean just what it says; that it shall import uniformity of every kind, both "intrinsic" or "inherent" uniformity among the taxpayers, and also "geographic uniformity" throughout the jurisdiction of the in-

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[5] Respondent's word, "analogous". (Respondent's Brief p. 5; ante, p. 4.)

sular Government, as was recognized by the Circuit Court of Appeals for the First Circuit in *San Juan Trading Co.* v. *Sancho Bonet, Treasurer*, 114 F. (2d) 969, 972,[6] and in the earlier cases.

And, as is pointed out in our Supporting Brief (pp. 43-44, 54-57), that is likewise the interpretation heretofore always placed upon that provision of Section 2 of the Organic Act, alike by the insular Supreme Court and also by the Circuit Court of Appeals. Prior to this present case, there is no decision to be found, anywhere, questioning it, or even intimating that the word "uniform", there used, is to be construed as requiring only geographic uniformity. It had uniformly been construed as requiring *both* "inherent" and also "geographic" uniformity. Respondent's bald assertion to the contrary[7] is not even attempted to be supported by any analysis of the decisions.

Nor is Respondent's position strengthened, nor the lack of power in the Legislature aided, by Respondent's observation [*Brief*, p. 6] that "The provisions for progressive rates are not new; they were not added by the 1941 amendments, which merely altered the rates"; and that "they were part of the Insular Income Tax Act as originally enacted" in 1925; "and have been in effect continuously since 1925".[8] As said in our Petition (Point II-C, p. 46):

> "The question here is a question of the extent of the power delegated to the Legislature by the Act of Congress. That power is not enlarged,—nor the lack of power supplied,—by the fact that taxpayers may not have heretofore assailed the Act in its earlier form, with its more moderate rates."

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[6] *Confer*, as to this *San Juan Trading Co.* case, our Supporting Brief, pp. 44, 55.

[7] Top of second paragraph, p. 6, Respondent's Brief.

[8] The progressive tax provision of the earlier Puerto Rican Income Tax Act of 1921 had been held invalid under the "uniform" tax requirement of Section 2 of the Organic Act, by the United States District Court for the District of Puerto Rico, affirmed by the Circuit Court of Appeals for the First Circuit, in *Domenech, Treasurer* v. *Havemeyer, supra*, 49 F. (2d) 849, 852, cited in our Petition and Supporting Brief here (pp. 11, 20, 43, 52, 54, 55-56).

See, in this connection, *Sancho Bonet, Treasurer*, v. *Valiente*, 93 F. (2d) 327, 330-331, and *Same* v. *Acevedo Quiles*, 93 F. (2d) 331; (certiorari denied in each case, April 11, 1938, 303 U. S. 662; and rehearings denied, May 16, 1938, 304 U. S. 588), invalidating more than 1000 Puerto Rican statutes, many of them of great importance, enacted at various times all the way from the year 1900 up to 1937, because enacted in the form of "Joint Resolutions", instead of "by bill" as required by Section 34 of the Organic Act. The Circuit Court of Appeals there said, in the *Valiente case*, 93 F. (2d) *supra*, at p. 331:

> "[4] It is further contended * * * ; but here we are seeking the intention of Congress in the enactment of Section 34" [*in the present case, Section 2, of the Organic Act*], "not that of the Legislature of Puerto Rico".

See also *Porto Rico Telephone Co.* v. *People of Puerto Rico*, 47 F. (2d) 484, 486-487, invalidating, in 1931, quite a number of statutes enacted by the Legislature in 1919, which had been duly published as statutes,—on the ground that they had been, in reality, "pocket vetoed" by the Governor [*Confer*, "Pocket Veto Case," 279 U. S. 655, 672], under the terms of the Organic Act.

And likewise, Respondent's final contention on this branch of the case, that (*Brief*, p. 6):

> "Clearly, denial to the insular legislature of authority to provide for progressive rates of income taxation would effectively preclude enactment of an equitable tax based upon ability to pay,"

really answers itself. The great States of Illinois, Pennsylvania, Tennessee, and Washington,[9] as well as many others[10] get along without progressive income taxes.

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[9] Supporting brief, p. 50. In Alabama, the State Constitution has been amended [25th Amendment] since the decision in 1920,

See also our Supporting Brief (Point II-D and E; pp. 47-48), as to the manifest purpose of the Congress in enacting this rigid limitation of the rule of absolute uniformity in taxation in the Organic Act for Puerto Rico, and in maintaining it in effect when relieving Puerto Rico (and the Philippines) from the burden of the Federal progressive taxes and heavy excess war taxes by the provisions of Section 5 of the War Revenue Act of October 3, 1917,—manifestly intending that the Puerto Rican people should not be burdened with the extra costs of carrying on the war; and that, therefore, the delegation of the taxing powers to the insular Legislature by Section 3 of the Organic Act, taken in connection with this limitation on the rule of taxation in the 22nd paragraph of Section 2 of the Act, should limit the local taxing powers of the Legislature to the powers of raising money for the ordinary expenses of the Government,—such only as are within the ordinary powers habitually exercised by State Legislatures. (*Confer: People of Puerto Rico* v. *Shell Company*, 302 U. S. 253, 261, quoted on page 78 of our Supporting Brief.)

If it be thought that this policy should be changed in view of present conditions, or for any other reason, then that is a question for the Congress to consider. The Congress possesses ample power to amend the Organic Act in any way it may see fit, and, of course, if it should so decide, to authorize the Legislature to provide for progressive income taxes in the Island.[11]

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there cited, in *Eliasberg Bros. Merc.* v. *Grimes*, so as now to permit the legislature to levy progressive taxes. But in the other States named, it appears that the prohibition still stands. *Confer footnote* 11, *infra*.

[10] Connecticut, Florida, Indiana, Maine, Michigan, Nebraska, Nevada, New Hampshire, New Jersey, Ohio, Rhode Island, South Dakota, Texas, West Virginia and Wyoming; as well as the Territories of Alaska and the Canal Zone. [*Confer*, Martindale-Hubbell Law Directory, 1944, Vol. II, Law Digests]

[11] In analogy, for example, to the recent 25th amendment to the State Constitution of Alabama granting that power to the Alabama Legislature, which had previously been withheld from it under the decision of the Alabama Supreme Court in the case cited on page 50 of our Supporting Brief.

Points III and IV.

As to our "Point III" (Supporting Brief pp. 57-59), that the taxation of stockholders upon dividends by these 1941 amendments is double taxation and therefore violative of this requirement of Section 2 of the Organic Act that the rule of taxation in the Island shall be "uniform"; and our "Point IV" (pp. 60-64) that the taxation of members of partnerships on partnership profits, after the partnership as a unit has already been taxed on the same profits, is even more flagrantly, not only double taxation of the same profits and hence a violation of that requirement that the rule of taxation in Puerto Rico be "uniform", but is also a taking of property without due process of law and a denial of the equal protection of the laws,—particularly in view of the provision of Section 2-(a)-(3), as amended by the amendatory Act No. 31 of April 12, 1941, broadening the definition of the term "partnership" for the purposes of the Act so as, expressly, to make it include in addition to all the ordinary types of partnership, "further, two or more persons under a common name or not, engaged in a joint venture for profit" (Supporting Brief, p. 63):—

In their attempted answer to these points *Respondent's Brief* (pp. 6-9) *utterly ignores the effect of the requirement* of the Congress in Section 2 of the Organic Act, discussed in our first two Points [*cf. ante*, pp. 2-10] that the rule of taxation in the Island shall be "*uniform*"; *and hence misses the entire point of our argument.* It does not answer it at all.

Point V.

As to our Point V (Supporting Brief, pp. 64-72),—and our corresponding "Question 5" (Petition, pp. 26-27),—that the Legislature of Puerto Rico does not possess the power [without directly amending the community property laws of the Island] to levy the income tax against the husband alone upon the entire aggregate incomes of the conjugal community,—Respondents have no answer, except simply

to assert, without explanation or argument (*Brief*, pp. 10-11), that this is a question of purely local law upon which the decision of the insular Supreme Court is not to be disturbed unless "inescapably wrong", under the established rule of this Court as to reviews of decisions of Territorial courts of last resort, recently reaffirmed in this Court's decisions at its last term, on May 29, 1944, in No. 349, *De Castro* v. *Board of Commissioners of San Juan*, and No. 497, *Mario Mercado e Hijos* v. *Commins*.

That is likewise substantially the only ground upon which the Circuit Court of Appeals affirmed the judgment of the insular Supreme Court [Petition, p. 17; R. 62.]

But in thus placing their answer to this point solely upon this bare assertion, Respondents once more entirely overlook, or ignore, the essential grounds upon we are basing our Petition for a review of this case by this Court, insofar as it concerns this Point, wherein we point out (*Supporting Brief*, pp. 66-71 in connection with "Question 5," pp. 26-27, and paragraph 4, pp. 32-33, of the "Reasons for Granting the Writ" in the Petition) that the question here presented is not at all one of purely local law; but is, on the contrary, one of federal law turning upon the insular Supreme Court's misunderstanding and misapplication of the applicable decisions of this Court; and that, therefore, the erroneous decision of the insular Supreme Court in this case is not to be treated as one disposing of questions purely of local law within the meaning of the rule of this Court concerning review of such decisions of Territorial courts of last resort; but is a decision upon federal questions, turning chiefly upon the insular Court's misunderstanding and misapplication of applicable decisions of this Court; and is in any event clearly "inescapably wrong" within the meaning of that rule, since it is in conflict with the applicable decisions of this Court upon which it relies, and rests upon that Court's clear misunderstanding and misapplication of those decisions of this Court. Respon-

dents do not directly deny this. They attempt no answer to our position in this regard.

As is pointed out in our Petition and Supporting Brief,[12] there is no real question here as to what the pertinent Puerto Rican local laws actually are. They are the provisions of the Civil Code, the Code of Civil Procedure, the Code of Commerce, and the Political Code, relating to the community property laws of the Island, which the Legislature possesses no power to change by indirection or to repeal or amend by implication, or in any other way than by direct amendment [which the 1941 amendments to the Income Tax Act here in question do not purport to accomplish], in view of the prohibition of the Congress against such indirect amendments, contained in the 9th paragraph of Section 34 of the Organic Act.[13]

It is settled by the earlier decisions of the insular Supreme Court in *Casal* v. *Sancho Bonet, Treasurer*, 53 P. R. Rep. 609, 618, and in *National City Bank* v. *De la Torre* (*on rehearing*), 54 P. R. Rep. 651, 654-655, quoted (p. 32) in our "Reasons for Granting the Writ" in our Petition here,—and not questioned or limited in any way by the insular Supreme Court's decision in the present case,—that "the conjugal partnership" in Puerto Rico "exists in an identical or similar form to that" in the States of the Union whose community property laws were before this Court in *Poe* v. *Seaborn, supra*, and its companion cases.[14] In that

[12] Petition, "Opinion of the Circuit Court of Appeals," and Footnotes 23 and 24 (pp. 16-18); "Question 5" (pp. 26-27); "Reasons for Granting the Writ," Par. 4 (pp. 32-33); and Supporting Brief, Point V, C to K inclusive (pp. 66-71).

[13] 39 Stat. 951, 962. So that any claim of a change in the community property laws otherwise than by direct amendment would involve a *federal question* of whether or not it fell within this prohibition of the Organic Act.

[14] State of Washington (*Poe* v. *Seaborn, supra*, 282 U. S. 101, 109-118); Arizona (*Goodell* v. *Koch*, 282 U. S. 118, 120-121); Texas (*Hopkins* v. *Bacon*, 282 U. S. 122, 125-127); Louisiana (*Bender* v. *Pfaff*, 282 U. S. 127, 130-132); and California, *as amended* (282 U. S. 792, 793-794, reversing the rule of the earlier case of

De la Torre case the amendment of the California Code had been discussed by the insular Supreme Court (54 P. R. Rep., *supra*, at pp. 653-655), and the resulting decision upon that amendment by the California Supreme Court [*Stewart* v. *Stewart*, 199 California 318], upon the basis of which this Court had decided in *United States* v. *Malcolm*, *supra*, 282 U. S. 792, 794, that the earlier California rule upon which the *Robbins* case (*United States* v. *Robbins*, *supra*, 269 U. S. 315) had been decided was no longer applicable; and the Puerto Rican Court had said in that *De la Torre* case on rehearing, as quoted on page 32 of our Petition, *supra*, that:

> "Given the changes that have occurred in the institution in Puerto Rico, similar to those of California, we do not doubt in reality that the interest of the wife is something more than a mere expectancy and that it can be said that here, as well as in California, her interest in the property of the conjugal partnership is greater than that of a presumptive heir."

In the present case the insular Supreme Court does not question or modify in any way the rule indicated by those foregoing cases; but on the contrary, fully accepting it, simply says (R. 14) that, under that rule, it finds itself constrained to follow the rule of this Court in,—"we see no escape for the petitioner from the doctrine laid down in."—the *Robbins case* (*United States* v. *Robbins*, *supra*, 269 U. S. 315 [1926], based upon the earlier California law, rather than this Court's later decisions in *Poe* v. *Seaborn*, *supra*, and its companion cases, based upon the laws of the other community property States of the Union and upon,—the *Malcolm* case, *supra*,—the California Code, as later amended along the lines indicated by the insular Supreme Court in the *De la Torre* case, *supra*, on rehearing.

The insular Supreme Court apparently arrives at this conclusion, that it should follow the doctrine of this Court

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United States v. *Robbins*, 269 U. S. 315, with relation to California, because, as this Court there specifically states (at p. 794) "of amendments of the California statutes" since the *Robbins* case was decided). *Confer*, Petition, Footnote 42, p. 68.

in the earlier *Robbins* case rather than the doctrine of this Court's later decisions in *Poe* v. *Seaborn* and its companion case, solely on the ground that it thinks that there is some undefined middle ground lying somewhere between this Court's two lines of decision in the *Robbins* case on the one hand and in *Poe* v. *Seaborn* and its companion cases on the other hand. As the insular Supreme Court phrases it in its opinion (R. 13, quoted in our Petition, p. 17):

> "Saying that 'the interest of the wife is something more than a mere expectancy' does not go so far as to call the wife's interest a vested one, and that is the only question before us at this time."

However, as we pointed out in Footnote 24 [pp. 17-18] to our Petition:

> "But this question is not purely one of local law; but is primarily a federal question, of the power of the Legislature under the Organic Act of Congress for Puerto Rico, and under the Fifth Amendment, and the decisions of this Court, to levy an income tax against the husband on the wife's half share in the community property; and whether or not, within the meaning of the decisions of this Court on that subject, any distinction can be made, as to the degree of the wife's ownership in the community property, between its being '*in reality* * * * *something more than a mere expectancy*' [the insular Supreme Court's language, above; R. 13], and being 'vested' [this Court's phrase, in *Poe* v. *Seaborn* * * * and companion cases * * *].
>
> "It is believed that no such distinction can properly be said to exist; and that within the meaning of this Court's decisions the wife's interest in the community property must be considered to be,—for the purposes of the determination of this Constitutional question,—either: (1) a 'mere expectancy' as the California courts formerly held that it was, under the former statutes of that State (*United States* v. *Robbins*, *supra*, * * *), now superseded by the later amendment to the California Code; or else (2) Something more than a 'mere expectancy',—that is to say, some form of *ownership; and that any such ownership* is something '*vested*'

within the meaning of this Court's decisions in *Poe* v. *Seaborn, supra,* * * *"—[and its companion cases, including *United States* v. *Malcolm, supra,* after the amendment of the California Code along the lines indicated by the insular Supreme Court in its opinion on rehearing in the *De la Torre* case above quoted].

"There can be no middle ground. Either the wife's interest is a mere 'expectancy'; that is to say no ownership at all; or else it is ownership, something 'vested.'

"The question is not one of local law; and cannot properly be disposed of by simply treating it as such, and avoiding discussion of the insular Supreme Court's plainly erroneous opinion, on that ground."

The insular Supreme Court also, as pointed out in our Petition (Foot-note 16, p. 10), rested its opinion in part upon its arbitrary refusal to follow this Court's decision in *Hoeper* v. *Wisconsin Tax Commission,* 284 U. S. 206, saying with reference to that decision of this Court (R. 16):

> "We recently went through a somewhat laborious process to distinguish a United States Supreme Court tax opinion which was shortly thereafter overruled. * * * Whether that process will be repeated in the present situation is not for us to say. Impartial commentators of wide repute have expressed views to that effect."

Whether or not the insular Supreme Court is correct in taking that attitude as to a decision of this Court, and in resting its decision at least in part on that attitude, presents a federal question. That portion of the insular Supreme Court's decision rests upon its misunderstanding and misapplication of the decision of this Court in *Hoeper* v. *Wisconsin Tax Commission, supra,* on the one side; as it does on its misunderstanding and misapplication, on the other side, of this Court's decisions in *United States* v. *Robbins, supra,* 269 U. S. 315, decided in 1926, and the later cases of *Poe* v. *Seaborn, supra,* and its companion cases,

decided four years later in 1930; and on its wholly erroneous and completely unsupported attempt to find some undefined middle ground between the "mere expectancy" which this Court held in the *Robbins* case did not constitute ownership in the wife, and what this Court called a "vested" ownership in the wife of some type, in the later *Poe* v. *Seaborn* and its companion cases.

The decision of the insular Supreme Court on these federal questions was clearly wrong; and since it rested upon misunderstanding and misapplication of decisions of this Court it must necessarily be considered "inescapably wrong". Nothing less can be said of that Court's conclusion (R. 14, *supra*) that, as it phrased it:

> "In view of these considerations, we see no escape for the Petitioner from the doctrine laid down in *United States* v. *Robbins*, 269 U. S. 315."

Respondent's brief does not even attempt to defend, on the merits, this branch of the insular Supreme Court's decision. Respondents rest wholly upon their [*erroneous*] assertion that this "is plainly a question of local law"; and upon this Court's rule with relation to decisions of such purely local questions by Territorial courts of last resort. Respondents add nothing to this. As stated, they make no attempt to defend this branch of the insular Court's decision on the merits.

But in taking that position Respondents plainly misunderstand the very rule of this Court in relation to such Territorial decisions, upon which they rely. That rule, as we understand it, does not wholly close the door to review of insular Supreme Court decisions even on questions of purely local law; and does not say that the victorious party to such a decision may, when the decision is challenged on appeal to the Circuit Court of Appeals—or is challenged here on petition for certiorari,—simply stand on the bare fact of the decision and that it was upon a question of local law. In other words, this Court's rule does not have the

effect of clothing the decision of a Territorial Supreme court with the mantle and the authority of a decision of a Supreme Court of a sovereign State of the Union upon a question of local State law. The State courts possess the power to declare what the State law is. But the decisions of the Territorial courts are reviewable under the various acts of Congress, by the appropriate Circuit Courts of Appeals, and by this Court upon certiorari.

And, as we understand it, the essential point of the decision of this Court in the recent case of *De Castro* v. *The Board of Commissioners of San Juan*, No. 349 at the last term of this Court, decided May 29, 1944, upon which Respondents here rely, was (*slip opinion*, pp. 5-6):

> "Thus interpreted and read in its context the principle, as restated in the *Bonet* case, that to justify reversal by the federal courts of a decision of an insular Supreme Court in a matter of local concern, 'the error must be clear or manifest; the interpretation must be inescapably wrong', *is not a mere mechanical device which requires or admits*, save in exceptional cases, *of the summary disposition of appeals from that court. Nor does it minimize the importance or dignity of the appellate function in such cases.* On the contrary, we think that it imposes on the Court of Appeals and on this Court the peculiarly delicate task of examining and appraising the local law in its setting, with the sympathetic disposition to safeguard in matters of local concern the adaptability of the law to local practices and needs. It is one which ordinarily cannot be performed summarily or without full argument and examination of the legal questions involved." (*Italics supplied*)

Respondents do not meet this requirement of the rule by simply inviting attention to their [*erroneous*] contention that the decision on this branch of the case turns upon a question of purely local law, with no attempt to defend the insular Court's decision on this point on the merits. Their complete failure to make any attempt to defend this branch of the decision, on the merits, is significant.

Point VI.

With regard to sub-point "B" of Point VI of our Supporting Brief (pp. 72-75) and the corresponding "Question 6" of our Petition (pp. 27-28), Respondents once more rely simply upon their contention that this again is a question of local law, and "like other questions of interpretation of local statutes, rests primarily with the local Court (*Brief*, pp. 11-12). In support of this proposition they cite (*Brief*, p. 12) *Dorchy* v. *Kansas*, 264 U. S. 286, 290-291, one of the cases already cited by us in our Petition and Supporting Brief (p. 28). In so doing Respondents once again overlook the difference in this respect between the Supreme Court of the sovereign state of Kansas whose decision finally settled the State law, and that of a Territorial Supreme Court whose decision, despite the respect to which it is entitled under this Court's rule, nonetheless remains subject to review in the Circuit Courts of Appeal and in this Court.

Manifestly the question here of the validity of this Section 12 of this Statute, an Act of the Legislature of Puerto Rico as an agent or delegate of the Congress acting under the powers delegated to it by the Organic Act of the Congress, is a federal question; and is surely not one purely of local law. If it were not so, the insular Legislature, with the concurrence of the insular Supreme Court and the insular Executive acting together,—and all of them together constituting but an agency of the Congress in the exercise of its plenary powers over "the Territory or other Property belonging to the United States," under Article IV of the Constitution,—could lift themselves by their boot straps, and invest the Legislature with powers never granted it by the Congress, nor intended to be granted. And the limitations on the delegated powers of the different branches of the insular Government could thus in effect be construed away, and set at naught.

Any question relating to the powers of the Legislature, or to the validity of an act of the Legislature acting under the

Organic Act, must therefore necessarily in the last analysis be a federal question. And, as pointed out in our Petition and Supporting Brief, the decision of the insular Supreme Court on this branch of this case was clearly and, we submit, even "inescapably" wrong.

Point VII.

In answer to our Point VII (*Supporting Brief*, pp. 75-78), correlative to our "Question 7", pp. 28-30 of our Petition), that the later Act No. 23 of November 21, 1941, expressly limiting the retroactivity of the insular Income Tax Act to the beginning of the calendar year 1941, by its further amendment to Section 3 of the Income Tax Act, operated as an amendment of the original Act from the date of the enactment of this last Amendatory Act of November 21, 1941 [*Posadas* v. *National City Bank*, 296 U. S. 497, 503; *Smallwood* v. *Gallardo*, 275 U. S. 56, 62; our *Supporting Brief*, p. 76; *Petition*, pp. 29-30],—Respondents surprisingly say only (pp. 13-14);

> "No reason is advanced by taxpayers to justify attribution of such an extraordinary intention to the legislature, and the Supreme Court of Puerto Rico stated that it was 'unable to follow the petitioner in his contention' (R. 29). Since the local court's construction was not palpably erroneous, the Court below" [Circuit Court of Appeals] "properly sustained its ruling in this respect (R. 68)."

It is submitted that this is really no answer whatever to our contention on this branch of the case. Respondents have no ground for saying that, as above quoted, "No reason is advanced by taxpayer to justify" our contention here. On the contrary, the decision of the insular Supreme Court, and that of the Circuit Court of Appeals affirming it on this branch of the case, is clearly and plainly and "inescapably" in direct conflict with the decisions of this Court in *Posadas* v. *National City Bank*, *supra*, and *Smallwood* v.

Gallardo, supra, cited on the pages above indicated in our Petition and Supporting Brief.

And, for the same reasons indicated in relation to the preceding question (*ante*, pp. 17-18), this also is clearly a federal question, and not one purely of local law.

Point VIII.

With regard to this final Point VIII of our Supporting Brief (pp. 78-81), in connection with our "Question 8" (pp. 30-31) and the "Additional Facts" (pp. 14-16) stated in our Petition,—that these 1941 amendments to the Income Tax Law of Puerto Rico, taken as a whole, are arbitrary and confiscatory, amounting to taking property for public use without compensation, and without due process of law,

> "and amounting also to an attempt to levy taxes for assumed 'general welfare' purposes, rather than taxation for usual governmental purposes under the power delegated to the Legislature by the Congress by Section 3 of the Organic Act,"—

this whole point is summarily disposed of by the Respondents by saying shortly (*Brief*, p. 14):

> "This tax was not imposed upon Puerto Ricans by an outside authority, but their own elected representatives. The local Supreme Court declared that to sustain taxpayer's contention in this regard would require 'a touch of arrogance' on its part (R. 39), and the court below held that the insular court was obviously correct in ruling that the tax of about $6,500 on approximately $39,000 of net income was not objectionable as confiscation under the guise of taxation (R. 69)."

But our contention on this branch of the case may not properly be thus summarily dismissed. As indicated in our Petition (pp. 14, 30-31) and Supporting Brief (pp. 78-81, *supra*), the insular Supreme Court considered it worthy of serious attention, and indicated some apparent hesitancy in deciding against it (*Opinion*, R. 35-39). As there pointed

out (R. 35), these 1941 amendments involved, for this petitioner at least, the almost astronomical increase of 623 per cent in his taxes over those required by the law as it stood before these amendments. And it is plain on the budget figures (*Confer, Petition*, pp. 15-16) that these unprecedented tremendous increases both in the normal tax and in the surtaxes were not required in any way for any normal or usual expenses of carrying on the insular government. On the contrary, it is perfectly plain that they were being levied in anticipation of undertaking some proposed or assumed projects of "general welfare", outside of and beyond carrying on the ordinary functions of the insular government.

In other words, they constitute an attempt by the insular Legislature to exercise the power of the Congress under the Constitution to tax for "general welfare" purposes (Const., Art. I, Sec. 8, Clause 1).

But that power of taxation for the "general welfare", has not been delegated by the Congress to the insular Legislature. [*Confer, Supporting Brief*, pp. 78-80.] It lies outside of and beyond the field of taxation for ordinary governmental purposes delegated by Section 3 of the Organic Act, and beyond "the subjects upon which Legislatures had been in the practice of acting with the consent and approval of the people they represented" [*People of Puerto Rico* v. *Shell Company*, 302 U. S. 253, 261; quoting *Maynard* v. *Hill*, 125 U. S. 190, 204]. These extraordinary taxes thus sought to be levied by the Legislature are therefore beyond its delegated powers, and void.

For all these reasons, as well as those stated in our original Petition and Supporting Brief, and in view of the importance and of the seriousness of the questions presented, it is believed that this case should be reviewed by this

Court; and that, therefore, the writ of certiorari should be granted.

Respectfully submitted,

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